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Nos. 04-805, 04-814

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States ("Chamber") and the National Association of Manufacturers ("NAM") respectfully move this Court to grant them leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the petitioners has consented to the filing of this brief, but counsel for respondents has withheld consent.

The Chamber of Commerce of the United States ("Chamber") is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. In furtherance of this mission, the NAM also files *amicus*

curiae briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber and the NAM seek to participate as *amici* here because the decision of the Ninth Circuit below will have demonstrable negative effects on their members. The Chamber and the NAM have a substantial interest in ensuring that legitimate joint ventures (and joint venture partners) will not face *per se* condemnation for pricing its own products, or other basic operating activities necessary for the joint venture to exist. The Chamber and the NAM thus respectfully request this Court to review – and overturn – the decision in the case below.

The Chamber's and the NAM's motion for leave to file the accompanying brief as *amici curiae* should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether it is *per se* illegal concerted action under Section 1 of the Sherman Act for an economically integrated joint venture to set the selling prices for its own products.

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF i

QUESTION PRESENTED iii

TABLE OF AUTHORITIES vi

INTEREST OF THE AMICI 1

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE PETITION 4

I. Joint Ventures Are Increasingly Important In Today's Economy, And Are Encouraged By The Courts And Antitrust Enforcement Agencies 4

II. The Court Of Appeals Ruling Is Inconsistent With This Court's Precedents And Conflicts With The Decisions Of Several Other Circuits Regarding The Proper Analytical Method For Reviewing Antitrust Challenges To Joint Ventures 7

A. The Court Of Appeals' Application of the *Per Se* Rule To A Bona Fide Joint Venture Is Wrong 8

1. The *Per Se* Rule Is Limited To Facially Anticompetitive Conduct 8

2. Legitimate Joint Ventures Are Analyzed Under the Rule of Reason 8

3. The Court Of Appeals' Ruling That Joint Ventures Are Subject To The *Per Se* Rule Is Inconsistent With This Court's Decisions And Contrary To The Rulings Of Several Circuits 13

B. An Integrated Joint Venture's Operating Decisions Are The Conduct Of A Single Firm, To Which Section 1 Does Not Apply 15

III. The Court Of Appeals' Erroneous Ruling Will Have An Adverse Impact On Legitimate Business Enterprises And On The United States Economy As A Whole 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) 16
Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) 9
Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 8, 9
Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593 (7th Cir. 1996) 9, 16
Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 14
City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268 (8th Cir. 1988) 16
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 6, 9
Dagher et al. v. Saudi Refining, Inc., et al., 369 F.3d 1108 (9th Cir. 2004) 13, 14, 15, 17
Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980) 16
Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002) 9
Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) 5,8
National Bancard Corp. v. Visa U.S.A., 779 F.2d 592 (11th Cir. 1986) 10
NCAA v. Board of Regents, 468 U.S. 85 (1984) 9-10, 14
NFL v. North Am. Soccer League, 459 U.S. 1074 (1982) 16
Polk Bros, Inc. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985) 9
Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) 10

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 9, 14
United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) 5, 9
United States v. Topco Assocs. Inc., 405 U.S. 596 (1972) 8
United States v. Visa U.S.A., 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004) 9
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STATUTES

15 U.S.C. § 1 ..... *passim*

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Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1535 (1982). 5
13 Zolman Cavitch, *Business Organizations With Tax Planning* (2003) 18
Howard H. Chang et al., *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223 6
Ernest Gellhorn & W. Todd Miller, *Joint Ventures and Standard-Setting: Problems in the Current Framework* (1995), *at* http://www.ftc.gov/opp/global/gellhorn.htm (1995) 6
XIII Herbert Hovenkamp, *Antitrust Law* (2005) 11, 12
Hovenkamp, *Federal Antitrust Policy* (1999) 12

J. Paul McGrath, *Antitrust Problems In Negotiating A Joint Venture Agreement*, 54 Antitrust L.J. 971 (1985) 17
Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1523 (1982) 11
Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1 (1991) 7
Robert Pitofsky, *A Framework for Antitrust Analysis of Joint* Ventures, 74 Geo. L.J. 1605 (1986) 6, 11
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Irving Scher, *Antitrust Adviser* (4th ed. 2004) 14
Gregory Werden, *Antitrust Scrutiny of Joint Ventures*, 66 Antitrust L.J. 701 (1998) 16, 17
U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) 4, 10
U.S. Dep't of Justice & Federal Trade Comm'n, *DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care*, 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994) 11
U.S. Dep't of Justice & Federal Trade Comm'n *Antitrust Guidlelines for the Licensing of Intellectual Property*, 4 Trade Reg. Rep. (CCH) ¶ 13,132 (1995) 11

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI*[1]

The Chamber of Commerce of the United States ("Chamber") is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers,

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the *Amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for petitioners have consented to the filing of this brief, and copies of the letters of consent have been filed with the Clerk of the Court. Because counsel for respondents has refused consent, this brief is accompanied by a motion of *amici* seeking leave to file.

the media and the general public about the vital role of manufacturing to America's economic future and living standards. In furtherance of this mission, the NAM also files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Many of the *Amici's* members participate in or are otherwise involved with joint ventures, which are ubiquitous in today's global economy. Joint ventures are essential for many American businesses to effectively compete, expand into new markets, make costly investments, and engage in innovation. Recognizing the procompetitive nature of many joint ventures, the prevailing analytical method employed in antitrust challenges is the rule of reason. By instead applying the *per se* rule to a legitimate joint venture's pricing of its own products, the decision in the case below jeopardizes the legal certainty on which businesses have relied. If allowed to stand, the Ninth Circuit's decision will inevitably have a chilling effect on the formation of new, procompetitive joint ventures and place existing joint ventures at risk for *per se* condemnation. For these reasons, *Amici* have a strong interest in the proper resolution of the important issues raised in this case.

SUMMARY OF THE ARGUMENT

Amici fully endorse the arguments advanced by petitioners Shell Oil Company ("Shell") and Texaco, Inc. ("Texaco") in this Court. *Amici* also fully incorporate the statement of facts contained in petitioners Shell's and Texaco's petitions. *Amici's* effort here is to present the reasons for reviewing the Ninth Circuit's decision in a somewhat different light, emphasizing how the Court of Appeals' fundamentally flawed analysis will have a chilling effect on the formation and operation of legitimate, procompetitive joint ventures. In sum, the Ninth Circuit's decision is not only at odds with well-settled principles of antitrust analysis, it is also at odds with the fundamental

purpose of the antitrust laws, which is to *promote* procompetitive economic activity, including joint ventures.

The issues in this case are straightforward, but it is essential to identify what is – and is not – at issue. The following facts are undisputed:

- There is no dispute about the legitimacy of Equilon Enterprises, LLC ("Equilon") as a joint venture, or that its formation was approved by the antitrust agencies, following an in-depth review.
- There is no dispute that the pricing provision in the joint venture agreement came into effect only *after* Shell and Texaco exited the market.
- There is no question that a single individual at Equilon priced its products pursuant to the joint venture agreement.
- There is no dispute that Equilon priced *only* the products that it manufactured and owned.
- Moreover, there is no dispute that Equilon actually produced significant efficiencies and cost savings.

These facts alone should be dispositive as to the proper antitrust principles which should govern this case. Forty years of judicial precedent, agency policy, and scholarly commentary clearly indicate that the rule of reason is the proper mode of analysis for legitimate joint ventures. These authorities also indicate that where a joint venture is integrated, its operating decisions should be viewed as the conduct of a single entity – and not subject to Section 1 at all.

By ignoring these well-settled antitrust principles, the Court of Appeals has created an environment that is hostile to the formation and operation of joint ventures. As explained more fully below, this decision must be reviewed by this Court to reverse this result. In summary, *Amici* will argue as follows:

- *First*, *Amici* will provide context necessary to illustrate the impact of the Court of Appeals' decision by reviewing the pervasive use of joint ventures in today's economy – as well as the tangible procompetitive benefits joint ventures are uniquely able to provide.
- *Second*, *Amici* will discuss the Court of Appeals' principal legal error of applying the *per se* rule to a legitimate joint venture. *Amici* will also demonstrate that the Court of Appeals erred in considering a joint venture's pricing of its own products to be concerted action.
- *Finally*, given the significance of joint ventures, *Amici* will explain that review is urgently needed to correct the uncertainty created by the Court of Appeals' decision. Unless reviewed by this Court, the decision threatens to chill the formation and operation of legitimate and procompetitive joint ventures, and also raise the specter of meritless antitrust litigation.

For these reasons, *Amici* respectfully request this Court to review and overturn the Court of Appeals' decision.

REASONS FOR GRANTING THE PETITION

I. Joint Ventures Are Increasingly Important In Today's Economy, And Are Encouraged By The Courts And Antitrust Enforcement Agencies

Joint ventures encompass a wide variety of business relationships in which two or more firms work together to engage in business activities, such as marketing, production, research and development, distribution, sales or purchasing. *See* U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* § 1.1 (2000) , *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) [hereinafter Antitrust Guidelines]. In 1964, this Court wrote, "[i]t is said that joint ventures were utilized in ancient times . . . . Their economic significance has

grown tremendously in the last score of years . . . ." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 169 (1964). In the forty years since *Penn-Olin*, joint ventures have become an even more important and widely utilized economic form. One recent study noted that more than 5,000 joint ventures have been launched in the past five years. James Bamford et al., *Launching A World-Class Joint Venture*, Harv. Bus. Rev. 1 (2004). In addition, 2000 data show that the largest 100 joint ventures represented more than $350 billion in annual revenues. *Id.*

Available data provide examples of the economic benefits joint ventures generate.

- Joint Ventures Create More Jobs: Companies involved in joint ventures are disproportionately responsible for new hiring. In a 2000 study, 81% of joint venture participants planned to hire new workers in the subsequent 12 months, resulting in 29% more new hires for those involved in joint ventures.[2]
- Joint Ventures Are Responsible For Increased Capital Investment: Joint venture participants are 58% more likely to make major new investments. Overall 85% more will be spent by those in joint ventures. *See* note 2, *supra*.
- Joint Ventures Invest More Broadly: "Compared to their counterparts on the sidelines, more CEOs involved in JVs are planning to increased spending in virtually all investment categories." *See* note 2, *supra*.

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[2] PricewaterhouseCoopers, *Trendsetter Barometer: Joint Ventures Providing High Traction for America's Fastest Growing Companies and the Economy* (Nov. 6, 2000), *at* http://www.barometersurveys.com (last visited Dec. 19, 2004). This study involved interviews of 421 CEOs of product and service companies identified in the media as the "fastest growing U.S. businesses" from 1995-2000.

- Joint Ventures Are Prevalent Across Industry: 2000 data suggests that 36% of service companies are participating in joint ventures, while 29% of product companies are participating. *See* note 2, *supra*.
- Joint Ventures Are Efficient: Companies involved in joint ventures expected to contribute 10.6% of their business assets to joint ventures in 2000, yet generate 12.0% of their revenue growth in return – with these figures growing in subsequent years. *See* note 2, *supra*.

The overall economic benefits afforded by joint ventures have been recognized by this Court, which stated that "joint ventures . . . hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). Commentators likewise recognize the economic benefits joint ventures generate. *See, e.g.*, Ernest Gellhorn & W. Todd Miller, *Joint Ventures and Standard-Setting: Problems in the Current Framework, at* http://www.ftc.gov/opp/global/gellhorn.htm (1995) [hereinafter Gellhorn & Miller, *Current Framework*] ("The potential benefits from joint ventures . . . to product innovation and increased competition make it particularly important that they be encouraged to operate within a competitive framework with guidance from antitrust agencies."); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint* Ventures, 74 Geo. L.J. 1605, 1606-07 (1986) ("[joint ventures] can have substantial and direct procompetitive effects. . . . [J]oint ventures are devices that frequently achieve legitimate business advantages. . . ."); *see also* Howard H. Chang et al., *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223 (1998).

Moreover, joint ventures form for a variety of reasons. For example, some joint ventures are formed to generate efficiencies while others are formed to introduce a new product. However, under the antitrust laws, both types of

joint ventures are equally valid. As former FTC Chairman Robert Pitofsky explained, "an 'efficiency-enhancing integration of economic activity' is not limited to circumstances in which the collaboration 'creates a new product.' If the agreement improves quality or service, reduces price or increases incentives for innovation, all of those qualify as well." Robert Pitofsky, *Joint Venture Guidelines: Views from One of the Drafters*, A.B.A. Sec. of Antitrust Law Workshop at 4 (1999), at http://www.ftc.gov/speeches/pitofsky/jvg91111.htm. In this regard, such efficiency-generating joint ventures may also be preferable to mergers. *See, e.g.*, Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 8 (1991) ("Economists have long recognized that the integration of assets that occurs in a merger may lead to competitive efficiencies. From an antitrust standpoint, it is preferable to achieve efficiencies through joint ventures rather than by mergers.").

Legitimate joint ventures thus enable firms to effectively compete, expand, innovate, and contribute to the health of the economy. The overwhelming consensus that these procompetitive benefits will be taken into account in assessing the legality of joint ventures under the antitrust laws has been a key consideration to the many firms that have entered into joint venture relationships. As discussed below, the Court of Appeals' decision in the instant case undermines this legitimate expectation and flies in the face of decades of antitrust jurisprudence, raising the specter of *per se* antitrust liability for participants in legitimate, efficiency enhancing joint ventures.

II. The Court Of Appeals Ruling Is Inconsistent With This Court's Precedents And Conflicts With The Decisions Of Several Other Circuits Regarding The Proper Analytical Method For Reviewing Antitrust Challenges To Joint Ventures

A. The Court of Appeals' Application Of The *Per Se* Rule To A Bona Fide Joint Venture Is Wrong[3]

1. The *Per Se* Rule Is Limited To Facially Anticompetitive Conduct

Under the *per se* rule, conduct is conclusively presumed to be illegal "without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *National Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). This Court has made clear that the *per se* rule is reserved for a narrow category of conduct that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979); *accord N. Pac. Ry.*, 356 U.S. at 5 (limiting the *per se* rule to conduct that has a "pernicious effect on competition and lack[s]. . . any redeeming virtue"). This Court has also cautioned against the expansion of the *per se* rule, given the risk that conduct "designed to 'increase economic efficiency and render markets more, rather than less competitive'" could be summarily condemned. *See BMI*, 441 U.S. at 19-20 (citation omitted). *See also United States v. Topco Assocs. Inc.*, 405 U.S. 596, 607-08 (1972) ("[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act."). The Court of Appeals' decision ignored this Court's teachings and instead applied the *per se* rule to a legitimate joint venture that had produced demonstrable efficiencies. This decision is clearly wrong.

2. Legitimate Joint Ventures Are Analyzed Under the Rule of Reason

Consistent with the foregoing principles, this Court has taught that antitrust challenges to the formation or operation

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[3] The *Amici* fully endorse the arguments advanced by petitioners Shell and Texaco before this Court concerning this issue.

of bona fide joint ventures should be analyzed under the rule of reason. *See Copperweld*, 467 U.S. at 768 ("joint ventures . . . are judged under a rule of reason.").[4] Overall, this Court explained, "the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy." *Penn-Olin*, 378 U.S. at 170. This Court has also cautioned against overly-literal application of the Sherman Act in joint venture analysis, *BMI*, 441 U.S. at 23.[5] Explaining this admonition, the *BMI* Court wrote that "[w]hen two partners set the price of their goods or services, they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9; *see also NCAA v. Board of Regents*, 468 U.S. 85, 117 (1984) (rejecting the *per se* rule to analyze of a joint venture's conduct).

Following this Court's teaching, the First, Second, Seventh, Eleventh, and D.C. Circuits have eschewed the *per se* rule and instead applied the rule of reason in antitrust challenges to legitimate joint ventures. *See, e.g., Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001); *United States v. Visa U.S.A.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996); *Polk Bros, Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985); *N. Bancard Corp. v. Visa U.S.A.*, 779 F.2d 592 (11th

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[4] Of course, where a joint venture is a mere cover for a cartel (in other words, a "sham"), *per se* condemnation is appropriate. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

[5] *See also Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 413-14 (2004) (cautioning generally against overbroad application of the antitrust laws given the risk of false positives that would chill the very type of conduct that the antitrust laws should seek to encourage).

Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986). In summary, this Court and several federal circuits all conclude that legitimate joint ventures are analyzed under the rule of reason. This judicial consensus provides necessary legal guidance for companies that participate in joint ventures. The legal errors committed by the Court of Appeals thus create a serious circuit split, the impact of which will resonate throughout the business community.

The Ninth Circuit's decision not only breaks with legal precedent, it also deviates from the sound policy decisions of the antitrust agencies, and the studied analysis of antitrust scholars – all of which unanimously support the application of the rule of reason to procompetitive joint ventures.

First, the antitrust enforcement agencies – the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") – have developed policies to encourage the use of procompetitive joint ventures. As Chairman Pitofsky explains, "[w]e accept that joint ventures are a common and useful device in an economy that is increasingly involved in global competition . . . ." Pitofsky, *Views from One of the Drafters*, at 2. The agencies' approach is best depicted by the promulgation of guidelines applicable to joint ventures, all of which make clear that legitimate joint ventures are analyzed under the rule of reason.

- *Antitrust Guidelines for Collaborations Among Competitors*. When reviewing the formation of a joint venture, the agencies apply an analysis similar to that employed for merger review – in other words, a rule of reason analysis. The rule of reason also applies to agreements concerning price, provided the agreement is reasonably related to the legitimate objectives of the joint venture. 4 Trade Reg. Rep. (CCH) ¶ 13,161.

- *DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care*. Although designed for the health care industry, these guidelines also recite general antitrust law principles applicable to joint ventures – *i.e.*, that joint ventures should be analyzed under the rule of reason.[6] 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994) [hereinafter "Health Care Guidelines"]
- *Antitrust Guidelines for the Licensing of Intellectual Property*. Designed specifically for intellectual property, these guidelines likewise indicate that joint ventures are analyzed under the rule of reason. 4 Trade Reg. Rep. (CCH) ¶13,132 (1995)

Moreover, antitrust commentators reviewing existing judicial precedent overwhelmingly agree that "antitrust generally begins its analysis [of joint ventures] with a presumption of legality. Joint ventures are to be condemned or restrained only if the opportunities for increased exercise of market power appear significant in proportion to likely benefits." XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2121b, at 126-27 (2d ed. 2005). As Chairman Pitofsky stated, "[i]t seems all but unanimous that *per se* rules are inappropriate for joint venture analysis and that rule of reason review will prevail." Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures* at 1621-22. Joseph Brodley likewise wrote that "[t]he guiding legal principle is [that] the Rule of Reason [applies to joint ventures], except in cases of flagrant cartel practices . . . ." Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1535 (1982). The American Bar Association Antitrust Section summarized antitrust treatment of joint ventures, stating that "an arrangement qualifies for rule of reason analysis as a joint

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[6] Statements 2, 3, and 8 specifically anticipate joint price setting, and make clear that when such conduct is reasonably related to the legitimate objectives of the joint venture, it is subject to rule of reason analysis.

venture when it involves some potential for an efficiency-generating integration of the parties' resources." 1 *Antitrust Law Dev.* 414 (5th ed. 2002). *See also* Gregory J. Werden, *Antitrust Scrutiny of Joint Ventures*, 66 *Antitrust L.J.* 701, at 11 (1998) ("The *per se* rule should not be applied if an integration is reasonably calculated to achieve social benefits . . . .").

Elaborating on judicial precedent, antitrust commentators and the antitrust agencies have explained that joint price setting is often necessary in cases of joint ownership of a good or service being sold. Echoing this Court's admonition in *BMI*, Professor Hovenkamp explains that "if two siblings inherit a house... and decide to sell it to a stranger, they will have to agree with each other on the price at which the house is sold.... When the joint owners are also competitors, the result is literally 'price fixing,' but it is a form of price fixing that should, when bona fide, be examined under the rule of reason." XIII Hovenkamp, ¶ 2132c, at 179-80 (2005). *See also* Hovenkamp, *Federal Antitrust Policy*, at 213 (1999) (structural analysis akin to merger analysis should apply where a joint venture permits parties to coordinate prices or output and has the "clear potential to produce substantial economies"). *See also Antitrust Guidelines*, § 3.2, *Health Care Guidelines*, Statements 2, 3 and 8 (expressly prescribing the rule of reason analysis where joint prices are set by legitimate joint ventures). Moreover, as discussed in Section II.B, *infra*, many courts and commentators treat the operational decisions of joint ventures in the marketplace as the decisions of a single firm, and thus not subject to Section 1 of the Sherman Act at all.

In summary, this Court's teachings and the precedent of several circuits make clear that legitimate joint ventures are analyzed under the rule of reason, to the extent that they are subject to Section 1. The Ninth Circuit's view that those decisions may be subject not just to rule of reason scrutiny

but also *per se* liability is inconsistent with antitrust doctrine and policy.

3. The Court Of Appeals' Ruling That Joint Ventures Are Subject To The *Per Se* Rule Is Inconsistent With This Court's Decisions And Contrary To The Rulings Of Several Circuits

Amici endorse the discussion of Petitioners Shell and Texaco advanced before this Court concerning the errors of the Court of Appeals' decision in the instant matter. As noted above, *Amici* view as paramount the need to resolve the conflict between the Ninth Circuit decision in this case and forty years of judicial precedent and policy, and thus focus on the Court of Appeals' errors with respect to its decision to apply the *per se* rule.

The Ninth Circuit relied on inapposite case law and created considerations not typically evaluated under the antitrust laws to justify the application of the *per se* rule. The Court of Appeals also stated that Petitioners sought an "exception" to the *per se* rule. *Dagher et al. v. Saudi Refining, Inc., et al.*, 369 F.3d 1108, 1116 (9th Cir. 2004). Again, the Ninth Circuit was wrong – no exception was sought, and petitioners were not seeking lenient treatment. As Chairman Pitofsky explained, the fact that the *per se* rule should not be applied to a joint venture "doesn't mean it is legal – only that more extended analysis is required." Pitofsky, *Views from One of the Drafters*, at 4.

As its primary authority for applying the *per se* rule, the Court of Appeals' majority opinion relied heavily on three cases, none of which support its ultimate conclusion.[7] *See Dagher*, 369 F.3d at 1118-20. In the instant case, the Court of Appeals reviewed a legitimate, integrated joint venture's

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[7] The *Amici* agree with and wholly endorse the legal analysis set forth in petitioners Shell's and Texaco's petitions before this Court.

pricing of the products it produced and owned. In contrast, *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) did not involve a fully integrated joint venture. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) did not involve a legitimate joint venture. Finally, in *NCAA*, 468 U.S. at 117, the Court did not apply the *per se* rule, even to a restraint less integral to the joint venture than the restraint at issue here. These cases simply do not justify the application of the *per se* rule in the instant case.

Despite a paucity of legal authority, the Court of Appeals' analysis continued, relying on factors that typically do not implicate the antitrust laws, and thus raising considerable concern among the business community.

First, the Court of Appeals cited as evidence of price fixing the joint venture agreement in which Shell and Texaco "unified" the pricing of the Texaco and Shell brands. *Dagher*, 369 F.3d at 1120. However, as a matter of sound business planning such, "[j]oint venture agreements typically contain restraints on such economic variables as price, output, operating costs, territories and customers, and access to the joint venture." Irving Scher, *Antitrust Adviser*, § 3.46, 3-152 (4th ed. 2004). Such provisions are not condemned under the *per se* rule where they are reasonably related to the procompetitive objective of the joint venture. *Id.* In the instant case, as Judge Fernandez's dissent recognized, a joint venture needs to sell – and hence price – its products even to exist. *Dagher*, 369 F.3d at 1127. Consequently, the proper mode of antitrust analysis is the rule of reason.

Second, the Court of Appeals relied on the fact that Shell and Texaco products were set at the same price. *See Dagher*, 369 F.3d at 1122. Antitrust principles, however, do not require a joint venture's products to be priced separately. As Petitioners Shell and Texaco have clearly explained, antitrust law does not consider the *reasonableness of a particular price* set by a joint venture. *See* Texaco Pet. at 22; Shell Pet. at 16. Rather, the review is of the decision to

set the price in the first place. Pricing is a crucial operating decision of any business. The Court of Appeals' decision effectively singles out joint ventures and joint venture partners for special scrutiny of their pricing decisions, a result not justified by sound economic or legal theory.

Finally, the Court of Appeals cited as evidence of price fixing the fact that the joint venture was pricing *existing* products, as opposed to a *new* product. *See Dagher*, 369 F.3d at 1124. This suggests that the antitrust laws treat joint ventures formed for the purpose of creating a new product differently than those formed to generate efficiencies. However, efficiency-creating joint ventures are just as valid under the antitrust laws as joint ventures that introduce new products. *See* Pitofsky, *Views from One of the Drafters*, at 4. In sum, the implication that a joint venture must introduce a new product to escape *per se* antitrust liability is not supported by legal precedent, economic theory, or antitrust policy.

In summary, the Court of Appeals' decision not only inappropriately subjects joint ventures and joint venture partners to the *per se* rule, it runs contrary to well-settled policy, discourages sound and responsible business planning, and limits the flexibility of businesses to make critical operating decisions. For all of these reasons, this erroneous outcome must be reviewed by this Court.

B. An Integrated Joint Venture's Operating Decisions Are The Conduct Of A Single Firm, To Which Section 1 Does Not Apply

As discussed above, the application of the *per se* rule to a legitimate joint venture's formation and operation was fundamentally wrong, since it is well-settled that the rule of reason is the presumptive mode of analysis. The Court of Appeals, however, also ignored the conclusions of many courts and commentators that the unilateral operating decisions of joint ventures should be treated as those of a

single firm – and thus not subject to Section 1 scrutiny in the first place.[8]

This Court has stated that "[i]n such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982); *see also NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) ("the league competes as a unit against other forms of entertainment") (Rehnquist, dissent). Several Circuits have likewise held that joint ventures should be analyzed as a single firm when engaging in ordinary marketplace activities. *See Chicago Professional Sports Ltd. v. NBA*, 95 F.3d at 600 ("the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment."); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-11 (3d Cir. 1980) (finding that such unilateral action, "no matter what its motivation, cannot violate § 1."); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274 (8th Cir. 1988) ("a conglomeration of two or more legally distinct entities cannot conspire among themselves...."). Professor Areeda's treatise underscores the point: "In general, once a venture is judged to have been lawful at its inception... its decisions should be regarded as those of a single entity rather than the parent's daily conspiracy on every purchase-sale-hiring-licensing choice." VII Phillip E. Areeda, *Antitrust Law*, at 535 (1986), *quoted in* Werden, *Antitrust Scrutiny of Joint Ventures*, 66 Antitrust L.J. 701, at n. 17; *see also* Werden, *Antitrust Scrutiny of Joint Ventures*, 66 *Antitrust L.J.* 701, at 4 & n.18.

Important policy reasons underscore the need to treat a joint venture as a single entity for purposes of antitrust challenges. For example, "[t]reating joint ventures as single

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[8] The *Amici* wholly endorse Petitioner Texaco's arguments advanced before this Court related to this issue.

entities for limited purposes allows meritless . . . price-fixing claims, which could erroneously be decided under the *per se* rule, to be rejected as a matter of law." Werden, 66 Antitrust L.J. at 4 n.18. *See also* Donald I. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 Utah L. Rev. 999 (1993); Chang, *Some Economic Principles For Guiding Antitrust Policy Toward Joint Venture*, 1998 Colum. Bus. L. Rev. 223 (1998).

In the instant case, the Court of Appeals concluded that Equilon's pricing decisions constituted concerted action. *Dagher*, 369 F.3d at 1116. The undisputed facts of the case, however, indicate otherwise. First, the joint venture agreement was not implemented until Equilon was formed, and there is no allegation of "gun jumping" in this case. In addition, a single individual at Equilon was responsible for setting the price of the products it produced and owned. Finally, Shell's and Texaco's involvement was limited to standard transitional planning associated with the formation of a joint venture. *See Dagher*, 369 F.3d at 1111-13. Such planning is generally required in order to form a joint venture in the first place. *See, e.g.*, J. Paul McGrath, *Antitrust Problems In Negotiating A Joint Venture Agreement*, 54 *Antitrust L.J.* 971, 973 (1985) ("[J]oint ventures frequently require more advanced planning, even before negotiations, and before negotiations leading to a renewal or modification of an existing joint venture."). Nonetheless, the Court of Appeals erroneously concluded that Equilon's pricing of its own products constituted concerted action.

The Court of Appeals' decision in the instant case is inconsistent with the position taken by this Court, the Third, Seventh, and Eighth Circuits, and respected commentators. In addition, the decision reflects neither the legal nor practical realities of joint ventures, and this misunderstanding, if allowed to perpetuate, would cast serious doubt over the viability of joint ventures going forward.

III. The Court Of Appeals' Erroneous Ruling Will Have An Adverse Impact On Legitimate Business Enterprises And On The United States Economy As A Whole

It is critical that this Court review – and overturn – the Court of Appeals' decision. The precedent set by the Court of Appeals will have a demonstrable negative effect, which will reverberate throughout the United States economy.

The facts and issues of the instant case are straightforward and can be clearly and efficiently resolved by this Court. The District Court correctly granted summary judgment since (1) the operative, undisputed facts did not raise a material issue as to *per se* price fixing; and (2) the plaintiffs disclaimed any reliance on the rule of reason. The Court of Appeals erred in reversing, and concluding that the *per se* rule applies to a legitimate joint venture's pricing of its own products. As discussed below, the implications of allowing the Court of Appeals' decision to stand are serious and far-reaching.

First, the Court of Appeals' decision will have a significant chilling effect on the formation and operation of legitimate joint ventures, given the serious risk of *per se* antitrust liability for conduct previously (and properly) analyzed under the rule of reason. Businesses forming legitimate joint ventures do so with the understanding that, to the extent it is subject to Section 1 of the Sherman Act, it will be analyzed under the rule of reason. This is expressed in the antitrust jurisprudence and literature discussed throughout this brief, and also in basic business planning texts. *See, e.g.*, 13 Zolman Cavitch, *Business Organizations With Tax Planning*, § 172.04[2], 172-103 (2003) ("[T]he principal mode of antitrust analysis for evaluating the legality of a joint venture has been essentially the same as that used for a merger or acquisition."). The Court of Appeals' decision eliminates the certainty of rule of reason treatment for legitimate joint ventures. Indeed, the *only*

certainty created by the Court of Appeals' decision is the certainty that a legitimate joint venture's pricing of the products it owns and manufactures can be held *per se* illegal. Overall, this creates an environment in which potential joint venture partners will be unlikely to form a joint venture since the negotiations, agreements, and the subsequent operations could be subject to *per se* condemnation. As a consequence, the formation of joint ventures will be chilled, resulting in the loss of the significant procompetitive benefits that joint ventures uniquely provide. This loss will be harmful to the business community, as joint ventures may be not be considered a viable economic form in light of antitrust risk. Moreover, the loss will also harm the U.S. economy as a whole, given the ubiquity of joint ventures in virtually every segment of the economy, and their disproportionate responsibility for investment and hiring. *See* Section I, *supra*.

Second, the Court of Appeals' decision is also likely to trigger an extension of the *per se* rule that would leave joint ventures completely untenable as an economic form. The instant case held that a joint venture's pricing of the products it produced and owned could be *per se* illegal. However, while pricing is a critical operational activity, it is only one of many operating decisions made by joint ventures. For example, a joint venture must make decisions concerning output, operating costs, territories, and customers. If the Court of Appeals' decision is allowed to stand, the *per se* rule could easily be extended to condemn such operating decisions. As discussed throughout this brief, there is no basis in antitrust law or policy to summarily condemn the business decisions made by legitimate joint ventures. The Court of Appeals' decision thus extends the *per se* rule, placing legitimate business practices at risk for summary condemnation, notwithstanding the procompetitive or efficient nature of the joint venture.

Finally, the Court of Appeals' decision will encourage widespread – and frivolous – antitrust lawsuits against joint ventures of all sizes, in all industries, and in all parts of the United States. The possibility of treble damages will likely prove inviting if a joint venture's legitimate conduct can condemned under the *per se* rule. Moreover, litigation would not be limited geographically. Antitrust cases have nationwide service of process, and joint ventures typically have a broad geographic scope. Taken together, the uncertainty of the law, the threat of *per se* condemnation for critical business decisions, and the threat of treble damages and frivolous litigation, creates an environment in which joint ventures simply will not form, leaving businesses with no choice other than to utilize less efficient economic forms. It also exposes the thousands of existing joint ventures to unfair and unanticipated antitrust liability.

In summary, the Court of Appeals' decision in the case below reaches a surprising and wrong result, which conflicts directly with forty years of antitrust jurisprudence. The Court of Appeals essentially equates legitimate joint ventures with price fixing cartels, concluding that both should be subjected to the *per se* rule. This will undoubtedly chill the formation and operation of legitimate joint ventures and consequently chill the type of economic benefits that joint ventures offer – product innovation, investment, and job creation. This Court should take the opportunity to review this case and provide needed clarity to the business community, to ensure that joint ventures remain a viable economic form, and that legitimate, procompetitive and efficient joint ventures are not subjected to the unwarranted specter of *per se* condemnation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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